



**Talam & another v Bakale & 29 others (Land Case 18 of 2023)
[2024] KEELC 7113 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
LAND CASE 18 OF 2023
L WAITHAKA, J
OCTOBER 23, 2024**

BETWEEN

MARY JEPKURUI TALAM 1ST PLAINTIFF

JOSHUA TALAI KIBOR 2ND PLAINTIFF

AND

THOMAS BAKALE & 29 OTHERS DEFENDANT

JUDGMENT

Introduction

1. By a plaint dated 3rd January 2022, the plaintiffs instituted this suit seeking judgment against the defendants for a declaration that they (the plaintiffs) are the rightful owners of the parcel of land known as Lelan/Kabiego/112 (hereinafter referred to as the suit property); a declaration that the defendants are trespassers in the suit property; an order of vacant possession of the suit property directed at the defendants directing them to vacate the suit property immediately; a permanent injunction restraining the defendants by themselves, their agents, servants and/or employees from trespassing upon, remaining in the suit property, charging, mortgaging and/or carrying on any activity in the suit property and/or in any other manner dealing with the suit property. The plaintiffs also seek an order of permanent injunction restraining the defendants from interfering with their use and enjoyment of the suit property.
2. The plaintiffs' suit is premised on the grounds that the suit property belongs to the estate of their father, Kibor Arap Talai, which estate they represent as the administrators and that as the administrators of the estate of their father, the plaintiffs are the bona fide owners of the suit property.
3. The plaintiffs complain that sometime in 2016 or thereabout, the defendants without any colour of right, trespassed into the suit property and despite having being required to vacate, refused to heed the demand request rendering the suit necessary.



4. It is noteworthy that at the time the plaintiffs' instituted the suit there were 29 defendants.
5. By an application dated 29th May 2023, the estate of Erick Kaino Cheserek, represented by its administrators namely Fredrick C. Kaino, David Cheserek and Jackson Cheserek moved the court seeking to be joined/added to the suit as the 30th defendant. Upon considering the application, this court allowed the estate of Erick Kaino Cheserek to be added to the suit as the 30th defendant.
6. Upon being added to the suit, the 30th defendant filed a joint statement of defence and counterclaim dated 23rd February, 2024.
7. Noting that in their statement of defence the 30th defendant purports to be representing the other defendants, yet the leave given to them did not extend the time within which the other defendants ought to have filed their defence, I would disregard any reference in the statement of defence as reference to the other defendants on the grounds that the other defendants did not seek and obtain leave of the court to file a statement of defence out of time and that the 30th defendant did not file any authority to plead on behalf of the other defendants as required by law.
8. Turning to the defence and counterclaim filed by the 30th defendant, the 30th defendant acknowledges that the plaintiffs' father purchased the suit property sometime in 1981 and got issued with a certificate of title. That notwithstanding, the 30th defendant contends that the family of the late Eric Kaino Cheserek who owned the suit property before it was bought by the defendants' deceased father in a public auction, did not move out of the suit property.
9. Terming the plaintiffs' suit statute barred, the 30th defendant contends that the estate of Eric Kaino Cheserek became entitled to the suit property on account of being in adverse possession thereof after 12 years lapsed without the plaintiffs' father evicting Eric Kaino Cheserek from the suit property. The defendants further contend that the registration of the suit property in favour of the plaintiffs' father is subject of a trust in their favour on account of having become entitled to it by adverse possession.
10. By way of counterclaim, the 30th defendant prays that the estate of the late Eric Kaino Cheserek, which they represent, be declared to have been entitled to be registered as the owner of the suit property in place of the plaintiffs' deceased father; an order that the registration of the plaintiffs' father as the owner of the suit property is subject of a trust in their favour; an order of cancellation of registration of the plaintiffs' father as the proprietor of the suit property and their registration as the proprietors of the suit property on behalf of the estate of their father, Eric Kaino Cheserek.
11. The plaintiffs filed a reply to defence reiterating their pleaded case.

Evidence

The Plaintiffs Case

12. When the case came up for hearing, the plaintiffs reiterated their pleaded case and produced evidence showing that after the defendants trespassed into the suit property in 2016 or thereabout, they tried to evict them therefrom but in vain.
13. In cross examination, the plaintiffs acknowledged that they had not stated in their pleadings that their father took possession of the suit property after purchasing it. The plaintiffs also acknowledged that they did not produce any evidence capable of showing that the defendants entered the suit property in 2016.



14. The 2nd plaintiff who testified as P.W.1, informed the court that he was aware of a letter produced by defendants, dated 9th October 2014 which suggests that the defendants were in occupation of the suit property as at that time. The 2nd plaintiff also acknowledged that the letters produced in evidence by the defendants, dated 9th February 1985 and 27th May 2009, give the impression that the late Eric Kaino Cheserek had not vacated the suit property. That notwithstanding, the plaintiffs maintained that the letters do not give the correct position about the suit property.
15. According to the plaintiffs, their father entered into the suit property immediately after he purchased it and erected a grass thatched house for his workers.
16. According to the 1st plaintiff, Nancy Jepkurui Talai (P.W.2), the house her father erected in the suit property was burnt by goons hired by Fredrick Cheserek in 2016.
17. It is also the testimony of P.W.2 that her brother P.W.1, is currently cultivating 2 acres of the suit property.

Defendants case

18. Fredrick Kaino, who testified as D.W.1, relied on his witness statement dated 23rd February 2024 and the documents contained in the defendants list of documents after they were adopted in evidence.
19. D.W.1 informed the court that he has lived in the suit property since he was born; that his family had lived in the suit property for 41 years and that the plaintiffs' have never lived in the suit property. He urged the court to dismiss the plaintiffs' suit and allow their counterclaim.
20. In cross examination, D.W.1 affirmed that Birech & Company Advocates wrote to them letters dated 27th May, 2009 and 9th October, 2014. They also received the letters produced by the plaintiffs as Pexbt 8, 9, 10, 11 and 12. He informed the court that, through the letters, the plaintiffs were asking the defendants to vacate the suit property.
21. Concerning the photographs in their list of documents, he stated that the photographs were taken by the surveyor (D.W.3). The photographs in his list of documents show the developments they have made in the suit property. The developments include their houses.
22. D.W.1 further informed the court that the plaintiffs never attempted to physically remove them from the suit property.
23. Angelina Kaino Chebore (D.W.2), a wife of the late Eric Kaino Cheserek, informed the court that her husband, Eric Kaino Cheserek, had 4 wives, three of whom live in the suit property.
24. In cross examination, D.W.2 informed the court that she was not aware that Kibor Talai was trying to evict them from the suit property. She had, however, heard that he was trying to do so.
25. D.W.3, Simiyu Edmund David Wekesa, informed the court that on instruction from the defendants' counsel, he visited the suit property in the company of D.W.1 and his assistant and picked the boundaries of the suit property. He took pictures and a satellite image. He also prepared a report which he handed over to the defendants' counsel.
26. He noticed that the land had been demarcated and there were structures thereon.
27. In re-examination, D.W.3 informed the court that he visited the suit property and established the status on the ground.
28. At close of hearing, parties filed submissions, which I have read and considered.



Plaintiff's submissions

29. In their submissions dated 2nd October 2024, the plaintiffs have reiterated their pleaded case that they are the owners of the suit property; that the defendants illegally entered the suit property in 2016 after the death of their father and that the defendants have not made up a case for being declared to have acquired interest in the suit property by adverse possession.
30. The plaintiffs have also challenged the defendants' plea to be declared as owners of the suit property on account of having been in adverse possession thereof on the ground that under Order 37 of the Civil Procedure Rules, a claim for adverse possession has to be instituted by an originating summons.
31. The plaintiffs have made reference to the case of *Kasuve vs. Mwaani Investment Limited & 4 Others* (2004) 1 KLR 184, where the Court of Appeal held that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years and submitted that the defendants have failed to demonstrate peaceful, open, exclusive possession of the suit property as of right without interruption for a period of more than 12 years.

Defendants' submissions

32. In their submissions filed on 25th September 2024, the defendants have given an overview of the parties pleaded case and framed eight (8) issues for the court's determination. These are: -
 - i. Whether the estate of the late Kibor Arap Talam or the estate of Kibor Arap Talai upon his death ever took possession of the suit property after purchasing it in a public auction?
 - ii. Whether the defendants entered the suit property in the year 2016?
 - iii. Whether the plaintiffs' claim is barred by Section 7 of the *Limitation of Actions Act* Cap 22?
 - iv. Whether the occupation of the suit property by Eric Kaino Cheserek with effect from 13th August 1981 upto 13th August 1993 was adverse to the late Kibor Arap Talai?
 - v. Whether after 13th August 1993 Kibor Arap Talai held the land comprised in title No. Lelan/Kabiego/112 in trust for Eric Kaino Cheserek and after the death of Eric Kaino Cheserek in trust for Eric Kaino Cheserek's estate?
 - vi. Whether after the death of Kibor Arap Talai on 12th August 2012, the estate of the late Kibor Arap Kaino continued to hold the suit property in trust for the estate of the late Eric Kaino Cheserek;
 - vii. Whether the court can order that the register for the land comprised in title No. Lelan/Kabiego/112, be rectified by cancelling the title of Kibor Arap Talai and by having the title of the land issued to the representatives of the estate of Eric Kaino Cheserek?
 - viii. What would be the appropriate order on costs?
33. With regard to issues No.1 and 2 above, the defendants have submitted that the issues should be answered in the affirmative because of the following reasons: -
 - i. It is common ground that Eric Kaino Cheserek was the registered owner of the suit property prior to 13th August 1981;
 - ii. That Eric Kaino Cheserek was in occupation of the land with his family;



- iii. That the plaintiffs have neither pleaded that the late Kibor Arap Talai ever took possession of the suit property after he bought it in a public auction nor have they pleaded that the late Eric Kaino Cheserek ever moved out of the suit property;
 - iv. That the letters produced in evidence as Dexbt 5, letter dated 9th January 1985, goes a long way to resolve the issues as the District Officer advised Kibor Arap Talai to file a suit in court for eviction of Eric Kaino Cheserek who was in occupation of the whole land;
 - v. That the letter dated 27th May 2009 (Dexbt 6) also helps to resolve the issues as at 27th May 2009, when the letter was written, more than 28 years after Kibor Arap Talai bought the suit property, Erik Kaino Cheserek and his family were still on the land;
 - vi. That the letter dated 9th October 2014 (Dexbt 7) written by M/S Birech, Ruto and Co. Advocates shows that up to 2014, the estate of Kibor Arap Talai had not moved into the suit property.
34. In view of the foregoing, the defendants submit that the plaintiffs pleading/claim that the defendants entered the suit property in 2016 is false.
 35. The defendants urge the court to find that the late Erik Kaino Cheserek and his family never vacated the suit property at any time until he died and that after his death, his estate remained in possession of the suit property to date.
 36. The claim by the plaintiffs that their father moved into the suit property immediately after the auction is said to be unsupported by the pleading hence contradictory to the plaintiffs' pleadings. Based on the decision in Nairobi Civil Appeal No.219 of 2013-*IEBC & Another vs. Stephen Mutinda Mule & 3 others* (2014) eKLR, the defendants have submitted that the plaintiffs' evidence suggesting that Kibor Arap Talai entered the suit property immediately after he purchased it should not be accepted as it is contradictory to the plaintiffs' pleadings.
 37. On issue 3, the defendants have made reference to section 7 of the *Limitation of Actions Act*, Cap 22, and submitted that from 13th August 1981, when the late Kibor Arap Talai got registered as the proprietor of the suit property, the period of 12 years within which he ought to have filed a suit for recovery of the suit property from Eric Kaino Cheserek had lapsed.
 38. It is the defendant's case that the present suit having been filed in January 2022, about 29 years after 13th August 1993, the plaintiffs' suit is time barred.
 39. On issue 4, it is the defendants' case that the late Eric Kaino Cheserek's occupation of the suit property with effect from 13th August 1981 to 13th August 1993 was adverse to the registered owner, Kibor Arap Talai.
 40. Based on evidence adduced in court showing that Eric Kaino Cheserek and his family were in occupation of the suit property and that despite Kibor Arap Talai having sought the assistance of provincial administration to evict Eric Kaino from the suit property, the late Kibor Arap Talai was unable to remove Eric Kaino and his family from the suit property.
 41. The occupation and possession of the suit property by Eric Kaino and his family is said to have been adverse to Kibor Arap Talai's interest in the suit property as it was open, continuous and as of right.
 42. On issue 5 and 6, it is submitted that upon expiry of 12 years, the late Kibor Arap Talai held the suit property in trust for the late Eric Kaino Cheserek. It is further submitted that after the death of Kibor Arap Talai, his estate represented by the plaintiffs, continued to hold the suit property in trust for the



estate of Eric Kaino represented by the 30th defendant. In that regard, reference is made to the case of *Peter Thuo Kairo v. Kuria Gacheru* 1988 2 KAR (Nairobi Civil Appeal No.42 of 1987) where the Court of Appeal stated: -

“...Section 37 of the Act (*Limitation of Actions Act*, Cap 22), however, keeps that title alive in the appellant as a trustee for the respondent. The respondent is entitled under section 38 of the Act to ask the High Court to order that he be registered as the owner of the land in place of the appellant.”

43. On issue 7, it submitted that the requirement that a claim for adverse possession be instituted by way of originating summons has since been relaxed by the courts and that where a suit is filed by way of a plaint for eviction of a defendant who is in occupation, such a defendant can counterclaim for adverse possession. In that regard, reliance is placed on the case of *Chevron (K) Ltd vs. Harrison Charo Wa Shutu* (2016)eKLR where the Court of Appeal referred to the decision in the case of *Gulam Mariam Noordin v Julius Charo Karisa*, Civil Appeal No. 25 of 2015 thus:-

“When the respondent elected to raise the defence of adverse possession without a counterclaim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent’s occupation of the suit property was adverse to that of the appellant; and that the latter’s was so extinguished.”

44. On issue 8, the defendants urge the court to dismiss the plaintiffs’ suit with costs and to allow the 30th defendant’s counterclaim.

Analysis and Determination

45. From the pleadings, evidence adduced and the submissions, the issue for the court’s determination is whether either of the parties has made up a case for being granted the orders sought.
46. Concerning that issue, as pointed out herein above, the plaintiffs instituted this suit seeking judgment against the defendants for inter alia an order of eviction of the defendants from the suit property on the ground that the suit property belongs to the estate of their deceased father, Kibor Arap Talai.
47. It is common ground that the suit property is registered in the name of Kibor Arap Talai, whom the plaintiffs represent as the administrators of his estate. It is also common ground that the late Kibor Arap Talai bought the suit property in an auction conducted in respect thereof, and got registered as the proprietor thereof on 13th August 1981.
48. Whilst the plaintiffs claim that Kibor Arap Talai took possession of the suit property immediately after he purchased it in 1981, the totality of the evidence produced shows that the late Kibor Arap Talai did not take possession of the suit property after he bought it. That fact is made clear by the letters produced in evidence by the 30th defendant dated 9th January 1985 (Dexbt 5); 27th May 2009 (Dexbt 6) and 9th October 2014 (Dexbt 7).
49. The contents of the letter dated 9th January, 1985 (Dexbt 5) are as follows: -

“Ref: Lelan/Kabiego/112-Kibor Talai

“Refer to your letter dated 18th June 1984 and the subsequent letter from the chief Lelan location on the above subject.



Having given Mr. Erick Cheserek enough time to move out of the farm which you bought. I would therefore advise that you apply for an eviction order from the court of law. This is the only way you can peacefully remove him from your farm to enable you to use it”

The contents of the letter dated 27th May, 2009 (Dexbt 6) are as follows: -

“Re: Lelan/Kabiego/112 In The Name Of Kibor Arap Talai

This is to advise you that we have been instructed by our above quoted client to write to you as hereunder.

That while our client is the registered owner of the above quoted parcel of land you have been occupying it illegally and our client would like you to vacate the same...”

The letter dated 9th October 2014, Dexbt 7, is in the following terms: -

“Re: Parcel Number Lelan/Kabiego 112 I.n.o Kibor Arap Talai

We generally act to protect the assets of the above quoted deceased person who until his demise was our client.

As the relatives go through the process of appointing the administrators of the estate of the deceased, we have learnt that there are people who are busy subdividing the above quoted parcel of land and are disposing certain portions to unsuspecting individuals who have colluded to interfere and intermeddle with the assets of the estate. Those doing so include, we are told the children of the late Erick Cheserem...”

50. The contents of the above quoted letters show that the late Eric Kaino Cheserek and his family, who were in possession of the suit property, continued being in use and possession of the suit property even after the same was bought by the late Kibor Arap Talai in a public auction.
51. Despite having been registered as the proprietor of the suit property, the late Kibor Arap Talai never filed any recovery suit against the Eric Kaino Cheresek or his estate within the time provided in law for recovery of his interest in land. That being the case, he lost his right to institute a suit for recovery of the suit property after 12 years lapsed. For that reason, I agree with the 30th defendant’s submissions that the plaintiff’s suit is time barred having been filed way after the time provided in law for filing a recovery suit expired.
52. The 30th defendant led evidence showing that Erik Kaino’s occupation of the suit property has been open, continuous and peaceful.
53. The plaintiffs have neither pleaded that the occupation of the suit property by the late Eric Kaino was with the permission of the owner nor led any evidence indicating or even suggesting that the possession, use and occupation of the suit property by Eric Kaino Cheresek and his family members was on account of permission granted by Kibor Arap Talai or them.
54. It is trite law that upon expiry of 12 years, the late Eric Kaino Cheserek and/or his estate became entitled to the suit property on account of having been in adverse possession thereof. The totality of the evidence adduced in this suit shows that the estate of the late Eric Kaino Cheserek has been in possession and use of the suit property for a period exceeding the 12 years prescribed by law for acquiring an interest in land registered in the name of another person. The totality of the evidence also shows that the possession has been open, peaceful and as of right.



55. The plaintiffs' claim that the defendants entered the suit property in 2016 is not supported by the totality of the evidence.
56. In view of the foregoing, I find and hold that the plaintiffs have not made up a case for being granted the orders sought. The 30th defendant, on the other hand, has proved that the estate of the late Eric Kaino Cheserek has become entitled to the suit property on account of having been in adverse possession thereof. Consequently, I dismiss the plaintiffs' suit with costs and enter judgment in favour of the 30th defendant as sought in the counterclaim.
57. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT ITEN THIS 23RD OCTOBER, 2024.

L. N. WAITHAKA

JUDGE

